MAR 22 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1966

No. 1177

CASEY GRAY, ALAN COWIE and PAUL WOODMAN, Individually, Jointly and on behalf of all other Non-Residents of the STATE OF WISCONSIN who are Residents of ILLINOIS and MICHIGAN, and who are allegedly subject to the WISCONSIN INCOME TAX,

Petitioners,

VS.

JAMES R. MORGAN, Commissioner of Taxation for the State of Wisconsin,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

ADELINE J. GEO-KARIS,
2600 Sheridan Road,
Zion, Illinois,
Counsel for Petitioners.

GEORGE D. KARCAZES,
29 South La Salle Street,
Chicago, Illinois,
Of Counsel.

MIDWEST LAW PRINTING CO., 326 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-3988

INDEX

	PAGE
Petition	1
Opinions Below	2
The Record on this Petition	2
Jurisdiction	3
Questions Presented	3
Statutes and Constitutional Provisions Involved	4
Statement of the Case	5
Reasons Relied on for Allowing the Writ	8
Supplemental Appendix:	
Opinion of the Court of Appeals	29a
Judgment of the Court of Appeals	35a

Table Of Citations

Cases:

Abernathy v. Carpenter, 208 F. Supp. 793, aff'd. 373 U.S. 241 (1962) 8, 9
Adams v. City of Park Ridge, 293 F. 2d 585 8
Bussie v. Long, 254 F. Supp. 797 8
Great Lakes Company v. Huffman, 319 U.S. 293 8
Hague v. C.I.O., 307 U.S. 496, 531 (1939) 8, 9
Holt v. Indiana Manufacturing Co., 176 U.S. 68 (1900) 8, 9
Hornsby v. Allen, 326 F. 2d 605, 610 (1964) 8, 9
Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351, 354 (1965) 9, 10
McNeese v. Board of Education, 373 U.S. 668 11
Progress Development Corp. v. Mitchell, 286 F. 2d 222 8
Ream v. Handley, 359 F. 2d 728, 731 (1966) 10
Zenith Dredge Company v. Corning, 231 F. Supp. 584 8

Statutes:

28 U.S.C. §1341 4
28 U.S.C. §1343 4

Constitutions:

Article IV, Section 2, Constitution of the United States 4
Article XIV, Section 1, Constitution of the United States 4

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1966

No.

CASEY GRAY, ALAN COWIE and PAUL WOODMAN, Individually, Jointly and on behalf of all other Non-Residents of the STATE OF WISCONSIN who are Residents of ILLINOIS and MICHIGAN, and who are allegedly subject to the WISCONSIN INCOME TAX,

Petitioners,

VS.

JAMES R. MORGAN, Commissioner of Taxation for the State of Wisconsin,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 22, 1966 in Appeal No. 15,722, which affirmed the District Court's judgment dated March 11, 1966 dismissing Petitioners' Complaint.

OPINIONS BELOW.

The District Court's judgment of March 11, 1966, dismissing Petitioners' Complaint (Appendix, pp. 24a-27a) is reported at 251 F. Supp. 316.

The Opinion of the Court of Appeals dated December 22, 1966 (affirming the District Court's judgment), is appended hereto, and is reported at 371 F.2d 172.

THE RECORD ON THIS PETITION.

The record on the foregoing Petition consists of the following:

Appendix of Appellants (the Petitioners herein) as filed in the Court of Appeals in connection with their aforesaid Appeal No. 15,722—which Appendix is paginated 1a to 28a, inclusive.

The opinion and judgment of the Court of Appeals—as included in the certified copy of the record in the Court of Appeals filed herewith.

The hereto-appended Supplemental Appendix (within the cover hereof), containing the opinion and judgment of the Court of Appeals—this Supplemental Appendix being paginated beginning with page 29a.

JURISDICTION.

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on December 22, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

Does the jurisdiction of Federal Courts under the "Civil Rights" statute, 28 U.S.C. § 1343, apply only to cases involving "personal liberty" or does it extend to cases involving "property" or "monetary" claims?

Does the proscription contained in 28 U.S.C. § 1341 supercede the absolute grant of original jurisdiction contained in 28 U.S.C. § 1343?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The relevant portions of the statutes and constitutional provisions involved in this case are brief enough to be set forth herein verbatim:

28 U.S.C. § 1341:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

28 U.S.C. § 1343:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • •
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; • • •"

Article IV, Section 2, Constitution of the United States:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1, Constitution of the United States:

> "Section 1. • • • No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. • • •"

STATEMENT OF THE CASE.

This action was commenced by Petitioners' Complaint for Declaratory Judgment and Injunction or Other Appropriate Relief, filed in the U. S. District Court for the Eastern District of Wisconsin on January 22, 1964.

The Plaintiffs allege that the Wisconsin income tax, as applied to non-residents, is discriminatory. That certain deductions available to resident taxpayers are not allowed to non-residents, resulting in a higher tax for non-residents, in certain cases, on the same amount of income. Plaintiffs also complain that many state services for which they are paying are either not available to them, or else, are available at a higher cost than to Wisconsin residents.

The relief sought by Plaintiffs is (a) that the Court determine the rights and obligations of Plaintiffs with respect to the deduction of interest on mortgages on their homes, with respect to the deduction of losses on their homes, and with respect to the payment of Wisconsin income taxes; (b) that the Court enjoin the enforcement of the Wisconsin income tax statutes against them; (c) that the court declare unconstitutional, in whole or in part, the Wisconsin income tax statutes as applied to non-residents; and (d) that the court order the State of Wisconsin to refund taxes illegally collected from non-resident Plaintiffs.

On June 14, 1965 the Defendant filed his motion to dismiss the Complaint on the grounds that (1) the civil rights section, 28 U.S.C. § 1343, is inapplicable to tax claims, and (2) that federal courts may not entertain

this action because Plaintiffs have a plain, speedy and efficient remedy in the Wisconsin Courts, as set forth in 28 U.S.C. § 1341.

Defendant's motion to dismiss was heard by the District Court on October 7, 1965 and said motion was taken under advisement. On March 11, 1966, the Court entered its order granting Defendant's motion to dismiss. The court held that Plaintiffs' contention that they did not have a plain, speedy and efficient remedy in the Wisconsin Courts "is without substance" (Appendix, p. 25a) that although 28 U.S.C. § 1341, does not "prevent a federal court from entertaining an action for declaratory judgment with respect to the constitutionality of a state tax statute, absent injunctive relief" the "wholesome restraint" reflected in that section is persuasive that relief by way of declaratory judgment should also be withheld by federal courts, that it inclines to "defendant's view that 28 U.S.C. § 1343 is inapplicable to the assertion of claims which are primarily fiscal," and that said § 1343 "does not supersede the clear prohibition of Section 1341." (Appendix, pp. 26a-27a)

The Court of Appeals affirmed the judgment of the District Court (Supplemental Appendix, *infra*, pp. 29a-34a). The Court said:

> "Under the circumstances present here, we find nothing in the history or construction of the civil rights statute, § 1343, to indicate its concern with the vaility of a state tax as a revenue measure. *Thus far, at least, it is quite clear that the courts have generally treated this statute as applicable to personal liberty rather than a property or monetary claim.*" (Supplemental Appendix, *infra*, p. 33a) emphasis supplied.

The Court then concluded:

> "We have carefully considered the whole of Plaintiffs' contentions, together with their cited authorities, but we are quite convinced that the decision of the trial court is sound and should not be disturbed. *This is not to say that we indicate a view that, under other circumstances, an effort to adjudicate 'human rights' under the Federal Constitution may not be asserted in a federal court, even though another forum may be open.*" (Supplemental Appendix, *infra*, p. 34a) emphasis supplied.

The provisions of the Wisconsin Income Tax Statute, Chapter 71, Wisconsin Statutes, 1961, which are challenged by petitioners, are set forth in the Complaint (Appendix, pp. 4a-18a). The question of the validity of said provisions was not reached in the lower courts and is not before this Court.

REASONS RELIED ON FOR ALLOWING THE WRIT.

This is a case of first impression and this petition is sought because the issues presented have a significant impact on civil rights as well as raising important questions of federal action in State tax matters.

We are aware of no federal case dealing with State taxes which holds that § 1343 applies only to matters involving "human rights" and not "property rights." We are aware of no authority holding that § 1341 supersedes or limits the grant of original jurisdiction contained in § 1343.

The district court cited and relied upon three cases. *Zenith Dredge Company* v. *Corning,* 231 F. Supp. 584, *Great Lakes Co.* v. *Huffman,* 319 U.S. 293, and *Abernathy* v. *Carpenter,* 208 F. Supp. 793, affirmed *per curiam,* 373 U.S. 241. The Court of Appeals cited and relied upon the same cases, and mentioned also, *Hague* v. *C.I.O.,* 307 U.S. 496, *Holt* v. *Indiana Manufacturing Co.,* 176 U.S. 68; and *Bussie* v. *Long,* a Louisiana District Court case reported at 254 F. Supp. 797.

The reasoning of the Court of Appeals is in conflict with that contained in two of its own previous decisions, *Progress Development Corp.* v. *Mitchell,* 286 F. 2d 222, and *Adams* v. *City of Park Ridge,* 293 F. 2d 585. In both of those cases the court refused to distinguish between "human rights" and "property rights." The reasoning of the court in the instant case is also in conflict with that of the Fifth Circuit Court of Appeals, as expressed in *Hornsby* v. *Allen,* 326 F. 2d 605 (1964). The *Hornsby*

case was brought under § 1343 and involved the denial of a liquor license to plaintiff by the officials of the City of Atlanta. The Court there upheld the federal court's jurisdiction saying, at pages 610-611:

> "* * * The coverage of the Civil Rights Act has long been the subject of heated controversy.
>
> * * *
>
> "The trend of the recent cases, however, has been to accept more and more actions under the civil rights statutes. Thus suits have been allowed for * * * an injunction against enforcement of ordinances regulating the operation of taxicabs, *Walton* v. *City of Atlanta,* 181 F. 2d 693 (5th Cir.), cert. denied, 340 U.S. 823, * * *."

Clearly, the issuance of a liquor license and the regulation of the operation of taxicabs are "property rights."

Petitioners and respondents both cited the Illinois district court case of *Joe Louis Milk Co.* v. *Hershey,* (1965) 243 F. Supp. 351, which upheld federal jurisdiction under § 1343 on a purely "monetary claim." In that case Judge Parsons referred to the *Abernathy* v. *Carpenter,* (supra); *Hague* v. *C.I.O.,* (supra), and *Holt* v. *Indiana Manufacturing Co.,* (supra) cases as "old cases" indicating that recent cases have tended to expand federal jurisdiction in the civil rights area. The Judge went on to say, at page 354:

> "* * * No difference in constitutional protection between property rights and human rights is expressed in the language of § 1343 itself, nor can any meaningful distinction be made or justified * * * Neither logic nor policy compels the conclusion that property rights are less deserving of protection under the Constitution and Civil Rights Act than are human freedoms. It appears under current statutory inter-

> pretation, that the right of an individual or a corporation not to be deprived of property without due process of law is a 'right * * * secured by the Constitution' within the meaning of § 1343. * * *"

The Court of Appeals in the instant case chose not to discuss the *Joe Louis* case in its opinion. The same Circuit has considered the *Joe Louis* case once, however, in *Ream* v. *Handley,* 359 F. 2d 728 (1966) decided approximately six months before the instant case. The Court's reasoning appears at page 731 of the *Ream* case:

> "* * * The controlling authority, however, seems to hold that the civil rights statutes, of which § 1983 is one, do not confer jurisdiction where a person seeks only to protect property or monetary rights. *Holt* v. *Indiana Manufacturing Company,* 176 U.S. 68, 72, 20 S. Ct. 272, 44 L. Ed. 374 (1900); *Hague* v. *C.I.O.,* 307 U.S. 496, 531, 59 S. Ct. 954, 83 L. Ed. 1423 (1939); *Abernathy* v. *Carpenter,* W.D. Mo., 208 F. Supp. 793, 794 (1962) aff'd, 373 U.S. 241, 83 S. Ct. 1295, 10 L. Ed. 2d 409 (1963). The only cited case which is authority for plaintiffs' view is *Joe Louis Milk Company* v. *Hershey,* 243 F. Supp. 351, 354 (1965). We are not prepared to ignore the foregoing cases antedating 1965."

The question whether the Constitution and Civil Rights Act distinguish between the protection to be afforded to "human rights" and "property rights" is far reaching and urgently in need of determination. The question whether States may avoid federal civil rights jurisdiction if they discriminate against a citizen's "property rights" but not if they discriminate against "human rights" is a vital question which must be determined finally and emphatically.

The reasoning employed by Judge Parsons in the *Joe Louis* case is convincing. The reasoning of this Court in

McNeese v. *Board of Education*, 373 U.S. 668 should be applied to the instant case. In that case this Court said, at page 671:

> "• • • We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. We stated in *Monroe* v. *Pape*, 375 U.S. 167, 183:
>
> > 'It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.'"

There is no legal, logical or moral reason to make a distinction between "human rights" and "property rights." There is, in fact, no such distinction. The term "property" has no significance except as it applies to something owned by someone. Property itself has neither rights nor value, save only as human interests are involved.

The authors of the Constitution and its Amendments realized what some today seem to have forgotten: that man has *three* great God-given rights, *equally* sacred from arbitrary infringement—the right to life, the right to liberty, and the right to property. These three rights are so closely bound together as to be essentially only one right. To give a man life but deny him liberty is to take from him all that makes life worth living. To give a man liberty but deny him his right to property is to take from him all that truly makes him free.

Nowhere does the Constitution or Civil Rights Act distinguish between these rights. We must assume that the Congress was aware of the provisions of § 1341 when it

enacted § 1343. If the Congress intended to *limit* the jurisdiction of federal courts "to redress the deprivation, under color of *any* State law, statute, ordinance, regulation, custom or usage, of *any* right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of Citizens" it could easily have done so by simply adding to the language of § 1343: "*except* those State laws dealing with State taxes and *except* those rights of citizens which are *merely* property or monetary rights." The reasons that the Congress did not make such an exception should be apparent. Both the District Court and the Court of Appeals have adopted a doctrine concerning Civil Rights which is novel and pernicious. To permit these decisions to remain unaltered will result in a proliferation of litigation and will open the door wide to the practice of discriminating between the basic rights of citizens.

The instant case presents issues of unusual significance, issues which do not appear to have been specifically passed upon by this Court, which have resulted in conflicting opinions in the lower courts, and which we trust this Court will resolve.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ADELINE J. GEO-KARIS,
2600 Sheridan Road,
Zion, Illinois,
Counsel for Petitioners.

GEORGE D. KARCAZES,
29 South La Salle Street,
Chicago, Illinois,
Of Counsel.

SUPPLEMENTAL APPENDIX

CORRECTED

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER, 1966 TERM and SESSION

No. 15722

CASEY GRAY, ALAN COWIE, and PAUL WOODMAN, Individually, Jointly and on Behalf of all Other Non-Residents of Illinois and Michigan and Who Are Allegedly Subject to the Wisconsin Income Tax,

Plaintiffs-Appellants,

vs.

JAMES R. MORGAN, Commissioner of Taxation for the State of Wisconsin,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

December 22, 1966

Before HASTINGS, *Chief Judge,* and KILEY and FAIRCHILD, *Circuit Judges.*

HASTINGS, *Chief Judge.* We have for review a judgment ordering the dismissal of a complaint for declaratory judgment, injunctive relief and refund of state taxes paid.

The complaint alleges that plaintiffs are residents and citizens of either Illinois or Michigan; that they are employed in Wisconsin; that they are subjected to the

payment of Wisconsin income tax on their wages and salaries received from Wisconsin employment; and that the application of the Wisconsin income tax statutes to them and others similarly situated offends the equal protection and due process guarantees of the Federal Constitution.

Jurisdiction of the United States District Court for the Western District of Wisconsin is invoked under the provisions of 28 U.S.C.A. § 1343, the civil rights statute. Convocation of a three-judge district court was requested pursuant to 28 U.S.C.A. § 2281, although no further reference to such procedure was made after filing the complaint.

Presently named as sole defendant in the complaint is James R. Morgan, Commissioner of Taxation for the State of Wisconsin.

Relief sought by plaintiffs in their complaint is (a) that the court determine the rights and obligations of plaintiffs with respect to the deduction of interest on mortgages on their homes and with respect to the deduction of losses on their homes; (b) that the court enjoin the enforcement of the Wisconsin income tax statutes against them; (c) that the court declare unconstitutional the Wisconsin income tax statutes as applied to non-residents[1]; and (d) that the court order refunded taxes alleged to have been illegally collected from them.

Defendant Commissioner moved to dismiss the complaint on two grounds: (1) that the civil rights section, 28 U.S.C.A. § 1343, is inapplicable to the tax claims asserted here; and (2) that this action may not be maintained in the federal court because plaintiffs have a plain, speedy and efficient remedy in the Wisconsin courts, as prescribed in 28 U.S.C.A. § 1341.

The district court, Honorable James E. Doyle presiding, found the law to be with the Commissioner on both

[1] The Wisconsin income tax statutes in question are cited as 1961 Wisconsin statutes, ch. 71; ch. 71.03(2)(f); ch. 71.05(3); ch. 71.05(5); ch. 71.05(8); ch. 71.07(1); ch. 71.09(6)(a), (b), (c), (d) and (e); and ch. 71.01. These relate generally to the imposition and collection of the state income tax, exclusions from gross income deductions from income, situs of income and personal exemptions. No good purpose would be served in setting out such provisions.

grounds for dismissal, and granted the motion to dismiss. The district court filed a well-reasoned memorandum opinion in support of the dismissal, reported as *Gray* v. *Morgan,* 251 F. Supp. 316 (1966).

Title 28 U.S.C.A. § 1341, provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

To avoid this proscription, plaintiffs allege they have no "plain, speedy and efficient remedy" in the Wisconsin courts. We regard this contention as being without substance.

The same district court, speaking through Judge Rabinovitz, in *Zenith Dredge Company* v. *Corning,* 231 F. Supp. 584 (1964), met this question, under a different factual situation, and resolved it adversely to the taxpayer. We have concluded that *Zenith* was correctly decided.

Under Wisconsin law, after an assessment of income tax has been made, an aggrieved taxpayer may make application for an abatement of the tax and for refund with the assessor of incomes. Wis. Stats. § 71.12 (1961). If he feels aggrieved by the determination of the board of tax appeals, he may seek further review in the circuit court of the appropriate county. § 73.015(2). The determination by the circuit court can be reviewed by the Wisconsin Supreme Court. § 227.21. Obviously, any decision of the Wisconsin Supreme Court is subject to final review by the United States Supreme Court.

As the Supreme Court said: "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question is involved. [Quoting *Matthews*

v. *Rogers,* 284 U.S. 521, 525-26 (1932).]" *Great Lakes Co.* v. *Huffman,* 319 U.S. 293, 298 (1942).

It is well-settled that federal courts will abstain in actions seeking declaratory or injunctive relief against state taxes, where there is a plain, adequate and complete remedy available in the state courts.

Despite plaintiffs' contention to the contrary, we are convinced that all the relief they seek by their complaint is available to them by a "plain, speedy and efficient remedy" in the courts of Wisconsin. We conclude that the proscription embodied in 28 U.S.C.A. § 1341 is applicable in this case and bars plaintiffs from proceeding in the federal district court.

The only remaining question of legal significance is, as Judge Doyle aptly stated, whether "the civil rights section, 28 U.S.C., Sec. 1343, is applicable here, and unless, further, the civil rights section overcomes both the force of 28 U.S.C., Sec. 1341 (as to federal injunctions against enforcement of state tax laws) and the reasons for federal restraint (as to federal declaratory judgments or judgments for tax refunds)." *Gray* v. *Morgan, supra,* at 318.

28 U.S.C.A. § 1343, provides in relevant parts:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • •
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; • • •"

Plaintiffs charge that the Wisconsin income tax statutes deny them equal protection of the laws and deprive them of their property without due process of law in violation of Article 4, Section 2 and the Fourteenth Amendment, Section 1 of the Federal Constitution.

Plaintiffs here maintain that § 1341 does not limit district court jurisdiction in § 1343(3), but they cite no case so holding. Further, we have been cited no case in which § 1343 was used as the ground of federal jurisdiction for relief against a state tax.

In the instant case, we have no claim of the denial of procedural due process. Plaintiffs do not complain of the method of assessing or collecting the tax. They complain of the tax itself.

Under the circumstances present here, we find nothing in the history or construction of the civil rights statute, § 1343, to indicate its concern with the validity of a state tax as a revenue measure. Thus far, at least, it is quite clear that the courts have generally treated this statute as applicable to personal liberty rather than a property or monetary claim.

In the instant case, plaintiffs specifically charge that the Wisconsin state income tax statutes discriminate between non-residents of Wisconsin and residents of Wisconsin. This alleged discrimination refers to state services in various categories available to resident taxpayers, such as schools, hospitals, recreational facilities and the like, which they claim are denied wholly or on a restricted basis to non-resident taxpayers. However, it should be pointed out that in this action plaintiffs are not seeking a declaration of their so-called rights to enjoy the use of such state facilities, but rather the relief sought is escape from the payment of Wisconsin income taxes.

We regard the case of *Abernathy* v. *Carpenter*, D.C. W.D. Missouri, C.D.; 208 F. Supp. 793 (1962), affirmed per curiam by the Supreme Court, 373 U.S. 241 (1963), as dispositive of this appeal concerning the applicability of § 1343. There the Supreme Court upheld the decision of a three-judge district court that an action by non-residents, against a state director of revenue, to enjoin collection of certain state income taxes was not within the civil rights jurisdiction of the court and that it was barred by the proscription of § 1341. This able opinion reviews the applicable decisions and distinguishes others cited here by plaintiffs, and such a discussion need not be repeated.

It is sufficient to say that in *Abernathy,* as here, the deprivation, if any, was not one of personal liberty, but merely a property right dealing with certain claimed exemptions from gross income under a state income tax statute. See also, *Hague* v. *C.I.O.,* 307 U.S. 496, 531 (1939), concurring opinion; *Holt* v. *Indiana Manufacturing Company,* 176 U.S. 68, 72 (1900). For a further discussion of the application of §§ 1343 and 1341, see *Bussie* v. *Long,* D.C.E.D. Louisiana, Baton Rouge D., 254 F. Supp. 797 (1966).

We have carefully considered the whole of plaintiffs' contentions, together with their cited authorities, but we are quite convinced that the decision of the trial court is sound and should not be disturbed. This is not to say that we indicate a view that, under other circumstances, an effort to adjudicate "human rights" under the Federal Constitution may not be asserted in a federal court, even though another forum may be open.

We hold that § 1341 means what it says, and having determined to our own satisfaction that plaintiffs have available to them a plain, speedy and efficient remedy in the Wisconsin state courts, they may not use a federal forum to seek the equitable relief sought here against the state income taxes in question. Further, the attempt to assert civil rights jurisdiction under § 1343 as somehow superior to the doctrine of federal abstention in order to escape the payment of a state income tax, under the circumstances of this case, must fail.

In view of this holding, the district court was correct in declining to request the convening of a three-judge district court. Indeed, plaintiffs have raised no question as to this on this appeal.

The judgment of the district court is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

In the
United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604

Thursday, December 22, 1966

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

CASEY GRAY, ALAN COWIE, et al., etc.,
Plaintiffs-Appellants,
No. 15722 vs.
JAMES R. MORGAN, Commissioner of Taxation for the State of Wisconsin,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

LIBRARY
SUPREME COURT, U. S.

FILED
APR 24 1967
JOHN F. DAVIS, CLERK

In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 1177

CASEY GRAY, ALAN COWIE and PAUL WOODMAN, Individually, jointly and on behalf of all other Non-Residents of the STATE OF WISCONSIN who are residents of the STATES OF ILLINOIS AND MICHIGAN, and who are allegedly subject to the WISCONSIN INCOME TAX,

Petitioners,

vs.

JAMES R. MORGAN, Commissioner of Taxation for the State of Wisconsin,

Respondent.

BRIEF FOR RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI

BRONSON C. LA FOLLETTE
Attorney General

CLARENCE G. BYLSMA
Special Counsel

321 South Hamilton Street
Madison, Wisconsin

WILLIAM GORHAM RICE
Of Counsel
321 South Hamilton Street
Madison, Wisconsin

INDEX

	PAGE
STATEMENT OF THE CASE	1
ARGUMENT AGAINST GRANTING THE PETITION	2
I. REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS IS SUPERFLUOUS BECAUSE THAT COURT FOLLOWED THE CONSTANT AND REPEATED DECISIONS OF THIS COURT IN CONSTRUING 28 U. S. C. SEC. 1343 (THE ONLY BASIS OF FEDERAL COURT COMPETENCE THAT PETITIONERS HAVE ALLEGED) TO RELATE TO VINDICATION ONLY OF "RIGHTS OF PERSONAL LIBERTY" BUT NOT OF ECONOMIC RIGHTS THAT CAN BE EXPRESSED IN PECUNIARY TERMS	2
II. REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS IS SUPERFLUOUS BECAUSE THAT COURT FOLLOWED THE CONSTANT AND REPEATED DECISIONS OF ALL FEDERAL COURTS, INCLUDING THIS COURT, AFFIRMING PER CURIAM, IN CONSTRUING 28 U. S. C. SEC. 1341 TO BE AN EXCEPTION TO OR LIMITATION OF THE COMPETENCE BESTOWED ON FEDERAL COURTS BY 28 U. S. C. SEC. 1343	4
III. THE HISTORY OF SECTIONS 1341 AND 1343 SUPPORTS THE LOWER COURTS' APPLICATION OF THESE SECTIONS WHICH RESULTED IN DISMISSAL AND AFFIRMANCE OF DISMISSAL OF THIS ACTION	6
CONCLUSION	13

PAGE

TABLE OF CITATIONS

CASES

Abernathy v. Carpenter, 208 F. Supp. 793 (1962) 3, 5, 13

Abernathy v. Carpenter, 373 U. S. 241 (1963) 5, 13

Alterman Transit Lines v. P. S. C. of Tenn., 259 F. Supp. 486 (1966) 3-4

Bussie v. Long, 254 F. Supp. 797 (1966) 3, 6

Dombrowski v. Pfister, 380 U. S. 479 (1965) 12

Hague v. C. I. O., 307 U. S. 496 (1939) 3, 9

Holt v. Indiana Mfg. Co., 176 U. S. 68 (1900) 8

Kerr v. Enoch Pratt Library, 254 F. Supp. 514 (1944) 12

Olin Mills v. Opelika, 207 F. Supp. 332 (1962) 13

STATUTES AND RULES

Judicial Code, Sec. 24, 1911 .....3, 7, 9, 10, 11, 12

Revised Statutes, Sec. 629 .....6, 8

Supreme Court Rule 19 .....2, 5

Supreme Court Rule 23 2

14 Stat. 27, C. 31 7

PAGE

18 Stat. 470, C. 231 8

36 Stat. 1087, C. 231 ..... 8, 11

50 Stat. 738, C. 726 11

28 U. S. C. 41, 1940 ..... 7, 11, 12

28 U. S. C. Sec. 1331 ..... 4, 11, 12

28 U. S. C. Sec. 1332 ..... 4, 11, 12

28 U. S. C. Sec. 1341 ..... 1, 4, 5, 6, 8, 11, 12

28 U. S. C. Sec. 1343 ..... 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13

In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 1177

CASEY GRAY, ALAN COWIE and PAUL WOODMAN, Individually, jointly and on behalf of all other Non-Residents of the STATE OF WISCONSIN who are residents of the STATES OF ILLINOIS AND MICHIGAN, and who are allegedly subject to the WISCONSIN INCOME TAX,

Petitioners,

vs.

JAMES R. MORGAN, Commissioner of Taxation for the State of Wisconsin,

Respondent.

BRIEF FOR RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner's statement is adequate, except that it fails to note that the Court of Appeals specifically holds in Chief Judge Hastings' opinion that 28 U. S. C. sec. 1341 limits sec. 1343, saying (371 F2d 172, 175):

> We hold that sec. 1341 means what it says, and . . . that plaintiffs . . . may not use a federal forum to seek the equitable relief sought here against the state income taxes in question.

ARGUMENT AGAINST GRANTING THE PETITION

I. REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS IS SUPERFLUOUS BECAUSE THAT COURT FOLLOWED THE CONSTANT AND REPEATED DECISIONS OF THIS COURT IN CONSTRUING 28 U. S. C. SEC. 1343 (THE ONLY BASIS OF FEDERAL COURT COMPETENCE THAT PETITIONERS HAVE ALLEGED) TO RELATE TO VINDICATION ONLY OF "RIGHTS OF PERSONAL LIBERTY" BUT NOT OF ECONOMIC RIGHTS THAT CAN BE EXPRESSED IN PECUNIARY TERMS.

The petitioners have stated, as "questions presented", the two chief issues raised in the District Court for the Western District of Wisconsin and in the Court of Appeals for the Seventh Circuit, issues which will be before this Court if it grants the petition for certiorari. But what is now before this Court is not these issues but the question whether there are "serious and important reasons" for reviewing the decision of the Court of Appeals. Supreme Court Rule 19, paragraph 1; Rule 23, paragraph 1 (h). Whether the decisions below were correct or incorrect, this Court may find it expedient to grant or deny the petition.

As for the meaning of 28 U. S. C. sec. 1343 (3), the petitioners do not and could not claim that this case presents any of the situations set out in Rule 19 as likely to induce the Court to issue the writ; but, attacking the merits of the jurisdictional decisions below, they seem to urge that this Court should grant their petition in order to reconsider its repeated interpretation of 28 U. S. C. sec. 1343

(3), namely, that it relates to "personal liberty" claims but not to "property" claims.

Justice Stone clearly expressed the rule in *Hague vs. C. I. O.*, 307 U. S. 496, 531 (1939):

> "... whenever the right or immunity is one of *personal liberty, not dependent for its existence upon the infringement of property rights,* there is jurisdiction in the District Court under Section 24 (14) of the Judicial Code to entertain it ..." (Italics added)

If this were a new issue, the diversity—or even confusion, in view of sec. 1343 which, as petitioners' brief shows, *lower* federal courts have recently shown in applying it, would be a persuasive reason for this Court to undertake review. But the Supreme Court itself has shown no uncertainty in its decisions, as the opinions below show. Moreover on the last occasion when this issue was presented to it—by appeal, not by certiorari—this Court pronounced only the briefest per curiam opinion in affirmance of the decision of the District Court, which had followed the view of Justice Stone, quoted above.

Abernathy vs. Carpenter, 373 U. S. 241 (1963)

It seems clear then that the Supreme Court only four years ago thought that the "personal liberty" limitation of sec. 1343 (3) needed no correction or further elucidation. We see no reason for the Supreme Court now to take any different view of the situation.

Several lower court decisions in tax cases have followed, most recently *Busse vs. Long,* 254 F. Supp. 797 (1966), and *Alterman Transit Lines vs. Public Service Com-*

mission of Tennessee, 259 F. Supp. 486 (1966). In the latter case the court said (p. 492):

> The Civil Rights Act, 28 U. S. C. sec. 1343 . . . may be thought of as a remedy in cases where the right asserted is incapable of pecuniary valuation. . . . Generally, jurisdiction under this Act can not be invoked in a pure tax action. A mere allegation of discrimination is insufficient to invoke Civil Rights Act jurisdiction automatically . . . Otherwise the jurisdictional amount provisions of 28 U. S. C. sec. 1331 and sec. 1332 could easily be circumvented by a mere allegation of denial of equal protection. . . . Equal protection in tax actions may constitute a federal question but it does not necessarily involve a corresponding Civil Rights Act violation.

If these cases speak the Court's mind, the "personal liberty" limitation of sec. 1343 needs no further affirmation.

II. REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS IS SUPERFLUOUS BECAUSE THAT COURT FOLLOWED THE CONSTANT AND REPEATED DECISIONS OF ALL FEDERAL COURTS, INCLUDING THIS COURT, AFFIRMING PER CURIAM, IN CONSTRUING 28 U. S. C. SEC. 1341 TO BE AN EXCEPTION TO OR LIMITATION OF THE COMPETENCE BESTOWED ON FEREDAL COURTS BY 28 U. S. C. SEC. 1343.

The second question is whether 28 U. S. C. sec. 1341 is or is not a limitation on sec. 1343. It is only this second question that presents by any possibility what petitioners call a" case of first impression". (Pet. p. 8)

Heretofore this question has not been discussed by the Supreme Court. The Supreme Court may deem it "an important question of federal law which has not been, and should be, settled by this Court". Rule 19, paragraph 1 (b).

On the other hand, *Abernathy vs. Carpenter,* 208 F. Supp. 793, 796 (1962), did consider it. The Court there took sec. 1341 to mean what it says, and the Supreme Court affirmed that case per curiam, without citation of authority.

Abernathy vs. Carpenter, 373 U. S. 241 (1963). So even this issue is not really "a case of first impression."

Nor do the petitioners make any serious attack on this ruling. Their argument consists only of (1) the palely relevant statement that Congress could have been more explicit, i.e. could have made it plain in sec. 1343 that sec. 1341 limited sec. 1343 (instead of saying in sec. 1341 that "District Courts shall not . . . restrain . . . collection of" state taxes); and (2) the naked assertion that the lower court's view, that sec. 1341 was such a limitation, is a "doctrine concerning civil rights which is novel and pernicious". (Pet. p. 12). The *Abernathy* case makes it no longer novel; and we see nothing pernicious in treating sec. 1341 as limiting sec. 1343 as well as other grants of jurisdiction to district courts.

For, as Judge Doyle said, 251 F. Supp. 316, 318 (1966), (Pet. p. 27a) of sec. 1343:

> ". . . it does not supercede the clear prohibition of Section 1341, not override the reasons for federal judicial retraint in the area of taxation by the states."

And Chief Judge Hastings agreeing, 371 F2d 172, 175 (1966) (Pet. p. 29a) referred approvingly to another recent

District Court decision so ruling on the relation between sec. 1341 and 1343.

Bussie vs. Long, 254 F. Supp. 797, 801 (1966).

In *Bussie* the Court reviewed the federal courts' custom of abstaining from impeding state tax collection that nurtured the enactment of sec. 1341 in 1937.

We therefore conclude that there is no sufficient reason for the Court to grant petitioners' prayer for certiorari.

III. THE HISTORY OF SECTIONS 1341 AND 1343 SUPPORTS THE LOWER COURTS' APPLICATION OF THESE SECTIONS WHICH RESULTED IN DISMISSAL AND AFFIRMANCE OF DISMISSAL OF THIS ACTION.

The opinions below deal with the foregoing issues in some detail and fully sustain our view of the law. To confirm their interpretation of the present sec. 1341 and 1343, we add, for the Court's convenience, a summary review of the statutory history of these sections.

The Civil Rights Acts, enacted at the end of the Civil War, enlarged federal court jurisdiction to prevent the perpetuation of slavery and racial discrimination, that might linger in state jurisprudence and judicial administration. The present law, 28 U. S. C. sec. 1343 (3), which plaintiff invokes to support the jurisdiction of the District Court in this case is descended from the parts of the Civil Rights Acts of 1866 and 1871 that entered the Revised Statutes of 1874 as sec. 629 Sixteenth. This paragraph became para-

graph 14 of sec. 24 of the Judicial Code of 1911, which in 1940, when the United States Code was enacted, became 28 U. S. C. sec. 41 (14), and, by the revision of 1948, 28 U. S. C. sec. 1343 (3). (Herein the term Judicial Code refers to the Judicial Code of 1911, and 48 U. S. Code, which title is now called the Judicial Code, refers to the enactment of 1940, which, revised, remains in effect.)

The language has changed appreciably from the original act of April 8, 1866, 14 Stat. 27, C. 31, sec. 1 and 3, which said:

> 1. [All] citizens . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.
>
> 3. . . . the district courts of the United States . . . shall have . . . cognizance of . . . all causes civil or criminal affecting persons who are denied . . . in the courts of [any state] any of the rights secured to them by the first section of this act.

28 U. S. C. sec. 1343 (3) now gives District Courts jurisdiction of civil actions

> to redress the deprivation, under color of any state law . . . custom or usage, of any right secured by the Constition of the United States or by any act of Congress providing for equal rights of citizens or of all persons. . . .

The elimination of mention of laws "for the security of . . . property" does not withdraw protection of such rights in itself. The term "any right secured by" the federal law is broad enough to include them. But property rights are

no longer, if ever, covered by sec. 1343 (3) in its present or earlier form, for reasons that are just as significant today as when *Holt vs. Indiana Mfg. Co.*, 176 U. S. 68, was decided in 1900. Then the jurisdictional statute (R. S. Section 629) gave the District Court jurisdiction of suits

> brought by any person to redress the deprivation, under color of any law . . . custom or usage of any state, of any right, privilege or immunity, secured by the law of the United States providing for equal rights of . . . all persons within the United States.

Whatever the reach of R. S. Section 629 prior to 1875 the establishment, by the Act of March 3, 1975, 18 Stat. 470, C. 231, of the general "federal rights" jurisdiction of U. S. Courts, enlarged access to those courts, provided the suit surmounted a valuation floor—the so-called "Jurisdictional amount". If the earlier Civil Rights Acts were given their fullest possible meaning, the new statute would not have amplified, perhaps would have restricted, federal district court jurisdiction. But the phrase "providing for equal rights" was now the significant phrase differentiating the old "civil rights" classification from the widely embracing category of "federal rights" (the rights now covered by 28 U. S. C. sec. 1331).

So when in 1900 the Indiana Mfg. Co. sued Holt and others who were "taxing officers" of Indiana—as plaintiffs here are suing the Tax Commissioner of Wisconsin—to prevent the collection of taxes which the plaintiff asserted violated federal law, the Supreme Court ordered the trial court to dismiss the bill because the amount involved was too small for the suit to qualify under the new legislation. Of the

older empowering statutes the court remarked that it was sufficient to say they refer to civil rights only and are inapplicable here. (176 U. S. at 72).

It is true that in that case the Court seems to equate "civil rights" with rights arising under the Fourteenth Amendment, and the Indiana Co.'s objections to the tax were put on other constitutional grounds. But the Supreme Court narrowed their meaning further in *Hague vs. C. I. O.*, 307 U. S. 496 (1939), where Justice Roberts said at p. 507:

> Until 1875, save for the limited jurisdiction conferred by the Civil Rights Acts, federal courts had not original jurisdiction of actions or suits merely because the matter in controversy arose under the Constitution or laws of the United States.

The lack of showing of a sufficient "jurisdictional amount" prevented that suit from qualifying for handling by the U. S. Courts under Judicial Code, sec. 24 (1), the general "federal rights" jurisdiction. But the plaintiffs invoked also sec. 24 (14), the civil rights heading. Justice Stone accordingly proceeded at p. 530 to distinguish these paragraphs:

> Since the two provisions [i.e.(1) and (14)] stand and must be read together, it is obvious that neither [abolishes] the other. . . . By treating Section 24 (14) as conferring federal jurisdiction of suits brought under the [Civil Rights] Act of 1871 in which the right asserted is inherently incapable of pecuniary valuation, we harmonize the two parallel provisions of the Judicial Code, construe neither as superfluous and give to each a scope in conformity with its history and manifest purpose.

The Justice examined two recent cases in which sec. 24 (14) jurisdiction had been upheld and said (p. 531):

> In both, the gist of the cause of action was not damage or injury to property, but unconstitutional infringement of a right of personal liberty not susceptible of valuation in money. . . . The conclusion seems inescapable that . . . whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction under Section 24 (14).

Chief Justice Huges and Justice Reed expressly agreed with Justice Stone on this jurisdictional issue; the other four justices who participated did not define the line between section 24 (1) and section 24 (14). Though Justice Stone does not explicitly say that rights of "personal liberty" are the *only* rights coming under sec. 24 (14), certainly the description of the covered right of personal liberty as one "not susceptible of valuation in money" and "not dependent for its existence upon the infringement of property rights" inexorably excludes the right alleged to be infringed in the present case, which *is* susceptible of valuation in money and *is* dependent for its existence upon the infringement of property rights.

That Judicial Code Section 24 (1), 36 Stat. 1087, 1091, now 28 U. S. C. Sections 1331 and 1332, was not meant to swallow up Judicial Code section 24 (14), now 28 U. S. C. section 1343 (3), or vice versa, is indisputable because of the terminal proviso of section 24 (1):

> That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to ap-

ply to any of the cases mentioned in succeeding paragraphs of this section.

36 Stat. 1087, 1091.

This was inserted to remove all doubt upon the point. H. R. Rep. No. 783 Part 1, 61st Congress 2d session page 15.

Later when sec. 24 (1) and sec. 24 (14) matured into separate sections of the U. S. Code, this sentence, no longer necessary, was deleted.

We turn now to the history of 28 U. S. C. section 1341, which sheds light on its relation to sec. 1343. The first version of the present section 1341, 50 Stat. 738, C. 726, was enacted three years before the U. S. Code of 1940, Title 48 of which displaced the old Judicial Code.

It was a proviso appended to section 24 (1) of the Judicial Code. So in 1940, when sec. 24 of the Judicial Code became 28 U. S. C. section 41, paragraph 1 of section 41 carried this proviso.

But when the Code was rearranged, revised and renumbered in 1948, section 41 of 1940 was distributed. Thus the affirmative part of section 41 (1) became the present sections 1331 and 1332, and the tax suit prohibition became section 1341, while section 41 (12), (13) and (14), with minor changes, became the present section 1343 (1), (2) and (3).

To recapitulate, the original version of section 1341 was enacted in 1937, long after section 1343 (in its earlier form of section 24 (14) of the Judicial Code). But it did not expressly limit that paragraph and did expressly limit section 24 (1). In 1940 section 24 became 28 U. S. C., sec. 41. In

the revision of 1948, 28 U. S. C. sec. 41 was split. The progeny of its first paragraph were sec. 1331, 1332, and 1341; the progeny of its fourteenth was sec. 1343 (3).

Since restriction of state tax collection was never before demanded of a federal court by a suit based on the "civil rights" jurisdiction, no court considered the effect that the proviso of sec. 24 (1) of the Judicial Code or sec. 41 (1) of 28 U. S. C. had on sec. 24 (14) or sec. 41 (14) respectively.[1]

Whatever the situation may have been before 1948,[2]

---

[1]Writing while the revision of 1948 was under consideration by Congress, Herbert Wechsler, in Federal Jurisdiction and the Revision of the Judicial Code, **13 Law and Contemporary Problems** 216, 228-230, discusses the customary and statutory abstention of federal courts with respect to state law and says: "The development described should be extended by the statute to deny original jurisdiction in all cases that present a claim of federal invalidity in state legislative or administrative action where, in the language of the present statutes, a 'plain, speedy and efficient remedy' is available in the state courts . . . These observations call for qualification in one instance: the rights of action specially conferred by Congress in the Civil Rights Laws . . . It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the state is smaller in such cases, but its interest is outweighed by other factors of the highest national concern. Needless to say, to promulgate the scope of the exception is no drafting problem; its measure is the rights of action given by the Civil Rights Laws."

Yet, in disregard of Professor Wechsler's opinion, Congress detached the restrictive provisos from sec. 24 (1) and made them, as section 1341 (taxation) and section 1342 (public utility regulation), as we see it, general limitations of federal court jurisdiction, not excepting "the Civil Rights Laws" jurisdiction (sec. 1343) from their reach. (We have found no cases involving the relation of sec. 1342 to sec. 1343.) Compare **Dombrowski vs. Pfister,** 380 U. S. 479, 484, note 2 (1965).

[2]The only possible civil rights case decided by a federal court during the period 1937-1948 that we have found which mentions the proviso, is **Kerr vs. Enoch Pratt Library,** 54 F. Supp. 514, 527 (1944), where the court refers to it in a footnote. It is not clear whether the fourth count of the complaint, of which the court is speaking, alleged a violation of sec. 41 (1) or of sec. 41 (14). Whichever it was, the court says that **expenditure,** not assessment or collection, of a local tax is what plaintiff complains of, and therefore, "even though literally construed, as I think it should be, this particular statutory provision", that is, the proviso, "seems not applicable here". Thereafter, the earliest case that we have found that considers the relation of the prohibition against restricting state tax collection to the civil rights head of fed-

we submit that since then the statutory prohibition of interference by federal courts with state tax collection (when there is a plain, speedy and efficient remedy by recourse to state channels of redress, the existence of which remedy it not now questioned by petitioners) has been and is today a limitation of the exercise of every part of the federal courts' jurisdiction, including that based on 28 U. S. C. sec. 1343.

CONCLUSION

The argument from precedent and reason and the argument from history concurrently show that the decision of the Court of Appeals was correct. Since the Supreme Court has already considered both the "questions presented" and has answered them as we believe they should be answered—the one expressly and consistently for many years, the other, by its per curiam disposition of *Abernathy vs. Carpenter*, 373 U. S. 241 (1963) without dignifying it by a reasoned opinion—it is our contention that no reason exists for granting the plaintiffs' request for review. We therefore ask the Court to enter an order of denial of their petition.

BRONSON C. LA FOLLETTE
Attorney General

CLARENCE G. BYLSMA
Special Counsel

WILLIAM GORHAM RICE
Of Counsel

---

eral court jurisdiction is **Olin Mills vs. Opelika**, 207 F. Supp. 332, (1962), decided two months before **Abernathy vs. Carpenter**, 208 F. Supp. 793 (1962). Both district courts upheld the prohibition without citation of cases.